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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

OAKWOOD HERITAGE HOSPITAL,

Employer,

and

Case No. 7-RC-22141

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW),**

Petitioner.

**PETITIONER'S BRIEF IN SUPPORT OF
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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TABLE OF CONTENTS

	<u>PAGE</u>
INDEX OF AUTHORITIES.....	i
INTRODUCTION.....	1
FACTS	2
1. Hospital Staff and Hospital Supervisory Authority	2
2. Patient Care Guidelines & Documentation	6
ARGUMENT.....	8
I. THE BOARD'S STATUTORY TASK AFTER <i>KENTUCKY RIVER</i>	8
A. Authority to Assign Other Employees	9
B. Authority to Responsibly Direct Other Employees	12
C. Use of Independent Judgment	18
D. Use of Independent Judgment in the Exercise of Supervisory Authority	19
II. APPLICATION OF THE STATUTORY CRITERIA TO THE FACTS OF THIS CASE	20
A. The Employer Bore the Burden of Proof.....	20
B. The Duties of the Charge Nurse Are Not Supervisory under Section 2(11) of the Act.....	21
C. Charge Nurses Do Not Have the Authority to Assign Under Section 2(11) of the Act.....	25
1. Managers possess the authority to assign under Section 2(11) of the Act.....	25
2. The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when assigning staff to patients	26

3.	The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when assigning breaks and lunches.....	31
4.	The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when reassigning staff.....	32
5.	The other duties engaged in by charge nurses are not indicative of supervisory status under Section 2(11) of the Act.....	33
D.	Charge Nurses Do Not Have the Authority to Adjust Grievances	36
E.	Secondary Indicia Does Not Establish Supervisory Status	39
F.	The RNs When Functioning as Charge Nurses Are Not Exercising Supervisory Authority	40
	CONCLUSION	42

CERTIFICATE OF SERVICE

INDEX OF AUTHORITIES

Cases

<i>Children's Habilitation Center, Inc. v. NLRB</i>	
887 F.2d 130 (7 th Cir. 1989)	18
<i>Highland Superstores v. NLRB</i>	
927 F.2d 918 (6 th Cir. 1991)	11
<i>J.L.M., Inc.</i>	
31 F.3d 79 (2d Cir. 1994).....	11
<i>Koons Ford</i>	
282 NLRB 506 (1986) <i>enf'd</i> , 833 F.2d 310 (4 th Cir. 1987).....	18
<i>NLRB v. Harmon Indus.</i>	
565 F.2d 1047 (8 th Cir. 1977)	29
<i>NLRB v. Kentucky River Community Care, Inc.</i>	
532 U.S. 706, 121 S.Ct. 1861 (2001).....	passim
<i>NLRB v. McEver Engineering, Inc.</i>	
784 F.2d 634 (5 th Cir. 1986)	11
<i>Providence Hospital</i>	
320 NLRB 717 (1996), <i>enf'd</i> , 121 F.3d 548 (9 th Cir. 1997)	passim
<i>Southern Bleachery & Print Works, Inc.</i>	
115 NLRB 787 (1956), <i>enf'd</i> , 257 F.2d 235 (4 th Cir. 1958)	
<i>cert, denied</i> , 359 U.S. 911 (1959).....	12, 16

Statutes

<i>Legislative History of the Labor Management Relations Act, 1947</i>	14, 15, 16
--	------------

Treatises

<i>N. Lichtenstein & S. Meyer, On the Line:</i>	
<i>Essays in the History of Auto Work</i> , 153 (1989).....	16

Agency Decisions

<i>Acme Markets, Inc.</i>	
328 NLRB 1208 (1999)	33
<i>Arlington Electric</i>	
332 NLRB No. 74 (2000)	17
<i>Byers Engineering Corp.</i>	
324 NLRB 740 (1997)	1, 29, 31
<i>Chevron Shipping Co.</i>	
317 NLRB 379 (1995)	18, 31
<i>Clark Machine Corp.</i>	
308 NLRB 555 (1992)	11, 30
<i>Dynamic Science, Inc.</i>	
334 NLRB No. 57 (2001)	28, 31

<i>Elmhurst Extended Care Facilities, Inc.</i>	
329 NLRB 535 (1999)	20
<i>General Dynamics Corp.</i>	
213 NLRB 851 (1974)	40
<i>Hausner Hard-Chrome of Ky.,</i>	
326 NLRB 426 (1998)	30
<i>Hexacomb Corp.</i>	
313 NLRB 983, 984 (1994)	40
<i>Injected Rubber Products Corp.</i>	
258 NLRB 687 (1981)	31
<i>J.C. Brock Corp.</i>	
314 NLRB 157 (1994)	39
<i>Ken-Crest Services</i>	
335 NLRB No. 63 (2001)	37, 38
<i>Kent Products</i>	
289 NLRB 824 (1988)	11
<i>KGW-TV</i>	
329 NLRB 378 (1999)	18, 19, 28
<i>Legion Utensils Co.</i>	
109 NLRB 1327 (1954)	17, 18
<i>New York University</i>	
221 NLRB 1148 (1975)	18
<i>Northcrest Nursing Home</i>	
313 NLRB 491 (1993)	18
<i>Ohio Masonic Home</i>	
295 NLRB 390 (1989)	29, 39
<i>Packard Motor Car Co.</i>	
61 NLRB 4 (1945)	16
<i>Parkview Manor</i>	
321 NLRB 477 (1996)	29
<i>Phelps Community Medical Center</i>	
295 NLRB 486 (1989)	20, 28, 32
<i>Plastic Industrial Products</i>	
139 NLRB 1066 (1962)	11
<i>S.D.I. Operating Partners</i>	
321 NLRB 111 (1996)	17, 30, 39
<i>Sears, Roebuck & Co.</i>	
304 NLRB 193 (1991)	20, 21, 35
<i>Ten Broeck Commons</i>	
320 NLRB 806 (1996)	8, 12, 16, 33
<i>Training School at Vineland</i>	
332 NLRB No. 152, slip op. at 2 (2000).....	24
<i>Weyerhaeuser Timber Co.</i>	
85 NLRB 1170 (1949)	31

INTRODUCTION

The Board granted review to examine the issue of whether a group of registered nurses, the majority of whom rotate through the charge nurse position, are supervisors under Section 2(11) of the Act.

The International Union, UAW, filed a petition seeking to represent a unit of about 220 registered nurses (RNs) employed at Heritage Hospital, an acute care hospital, in Taylor, MI. A hearing was held and the Regional Director found that the registered nurses were not statutory supervisors in that they do not possess the authority to assign, direct or adjust grievances using independent judgment. DD 19, 20¹ The Employer offered no evidence that the RNs have independent authority to hire, promote, demote, layoff, recall, reward, discipline, or discharge employees. DD 19 The Employer sought review of the Regional Director's decision raising only the issues of the alleged authority of the charge nurses to assign or adjust grievances under Section 2(11) of the Act.

The Petitioner argues that the charge nurse position is analogous to that of leadmen in that the charge nurses simply ensure work is fairly distributed and act as a conduit between staff and management. *See Byers Engineering Corp.*, 324 NLRB 740 (1997) (employees that equalize workload, act as contact point between employer and employees, and advise employees when they encountered unusual problems are leadmen).

¹ The Decision and Direction of Election is referred to as "DD," transcript cites as "TR," Employer Exhibits as "ER," Petitioner Exhibits as "P," all followed by the page number.

FACTS

1. Hospital Staff and Hospital Supervisory Authority

The patient care areas of Heritage include a medical/surgical floor (MSW), a medical/surgical floor dedicated to care for the elderly (MSE or NICHE), a behavioral health unit, a pain clinic, a recovery and outpatient care unit (PACU), a rehabilitation unit, an intermediate care unit (IMC), an intensive care unit (ICU), an emergency department (ER), and a surgical services (SS) or operating room (OR). ER 12

Each of these units employs RNs, also called staff nurses, as the primary care givers. RNs work either eight (8) hour shifts (days, afternoons, midnights) or 12 hour shifts. DD 11 The staff nurse job description states:

Job Summary

Under general direction, provides direct care to patients utilizing the nursing process. Guides and supervises nursing personnel, collaborates with other health care professionals, and coordinates ancillary staff. Functions within the framework of the policies and procedures of the Hospital and demonstrates professional growth and accountability.

Annually, RNs receive a copy of their job description and performance evaluation which outlines the appraisal criteria. These are: applying the nursing process, participation in monitoring quality, providing for the educational needs of the patient and their families, leaderships and professional development, monitoring a safe environment, attending work on time, and demonstrating service. DD 10, ER 2

Of the 10 patient care units listed above, nine units utilize the position of charge nurse.² RNs may be randomly assigned the charge tasks by their supervisor, they may volunteer for the duties or they may decide amongst the RNs working the particular shift

² The Pain clinic does not employ charge nurses. There was no testimony regarding the SS/OR unit. DD 12

who will perform the charge duties. DD 12, TR 410 The specific duties of the charge nurse vary (DD 12) and are discussed in detail below.

A majority of the 220 RNs take turns rotating the responsibilities of a charge nurse. DD 12 A rotating charge is someone that occasionally takes charge duty. TR 151 RNs have the option of performing the charge duties. DD 12 TR 152 The frequency an RN works charge depends on the number of RNs in the rotation and their work schedule. DD 12 RNs Coffee and Welch testified they worked one to two times in a two-week schedule. DD 12 Eleven RNs work as a permanent charge nurse, or someone that performs the charge duties each time they are scheduled to work. Their duties are the same as a rotating charge nurse. DD 12

Making up the balance of the nursing staff are Licensed Practical Nurses (LPNs), nurse aides, mental health workers, techs or paramedics and desk secretaries. There are only about 11 LPNs, who work primarily in the Behavioral Unit. ER 12 Each unit, depending on the shift, has several aides (or techs in the ER), and a desk secretary. TR 61, ER 12 Aides and secretaries are represented by SEIU, Local 79. TR 487

All of the nursing staff participates in a corporate orientation and in unit training before beginning work in their respective units. This training includes working one on one with a trainer or preceptor. New RNs spend time shadowing the preceptor learning all aspects of the job. DD 12, TR 233-28.

Each of the units has a Clinical Nurse Manager (Manager) and often one or two Assistant Clinical Managers. TR 28, 31, 32, ER 1, 12 The duties of the Manager are to oversee all aspects of the unit, develop the unit's budget, develop and implement policies for the unit and handle all patient and personnel issues. Managers handle all staff

problems, issue all discipline and respond to patient complaints. TR 43, 187-88, 580, P 3 Managers are the contacts at steps one and two of the grievance procedure outlined in the SEIU, Local 79 collective bargaining agreement and the contacts at each step of the progressive discipline procedure for non-bargaining unit employees outlined in the employee handbook.³ TR 184, 215-16 Managers, or their Assistants, perform all performance evaluations. DD 10 Managers are on call 24 hours per day, seven days per week. TR 189, DD 7 Along with the Assistant Clinical Managers, Managers handle all staffing issues and conflicts within the unit. DD 8, 15 They also handle all patient complaints. DD 15 Managers, or their Assistants, schedule all the nursing staff. TR 43, 46 Any changes in staffing is handled by Managers or the staffing office. DD 8, 13; TR 364

Assistant Clinical Managers (Assistants) assist the managers in the performance of their duties. TR 46, 580, P 3 They monitor the daily activities of patient care, handle discipline, schedule and handle administrative paperwork. Assistants work different shifts. DD 7⁴

³ The employee handbook as well as the SEIU collective bargaining agreement, both indicate that the Managers, or their Assistants, or the Supervisors are the immediate supervisors of the employees. DD 5, 6

⁴ In Behavioral Health one Assistant is scheduled on the afternoon shift and a second Assistant is assigned the midnight shift. TR 289 In MSW and MSW there are two Assistants, both assigned afternoons. In Rehab, one Assistant is assigned days and one afternoons. In IMC and ICU, there are two Assistants assigned days but one often works until 7 PM. TR 47 In the ER, the Assistant works days. In OR/SS, there is only one nurse scheduled for afternoon and midnight shift. In the pain clinic there is no staff scheduled on afternoons or midnights. In PACU, there is no midnight shift and one nurse scheduled on afternoons. ER 11, ER 12 Therefore, there is at least two conceded supervisors for each unit (Manager and Assistant), and often more than one. Three of the ten units have little or no staff working an afternoon or midnight shift and the balance, except for the ER, has at least an afternoon shift Assistant. Therefore, there are conceded supervisors in all units and often on more than the day shift. Obviously, those departments that have no afternoon or midnight shifts have no supervisor.

Other management personnel include the Clinical Nurse Supervisors (Supervisors).⁵ TR 39 These individuals are responsible for the running of the hospital during weekends and off shifts. Their duties include scheduling and handling all problems both administrative and personnel. TR 41, P3, DD 6 Supervisors handle problems on the floors as they arise during their shifts. TR 186-87

Contrary to the Employer's assertion at page 3 of their Request for Review, the Regional Director did find that the Managers "address the day-to-day issues and problems that arise within their units" and Assistants handle "the day-to-day issues and problems." DD 7 Behavioral Health afternoon Assistant, Carol Carney, said it was her job to make sure all unit tasks were complete and to handle all staff complaints (TR 328, 339) and that her Manager "manages the units." TR 289 Nick Mikaelian, Assistant in Rehab testified he was responsible for the "day-to-day operations." TR 430 Assistant Deb Vogel, in ER testified she "assist[s] with the day-to-day operations." TR 461 Jenna Ash, Assistant in MSE and MSW testified she handles "daily concerns." TR 474

The Managers and Supervisors report to the Nursing Site Leader and Director of Patient Care, Brenda Theisen. Ms. Theisen is responsible for all nursing care and all operations including personnel issues and patient problems. DD 6 TR 24, 27, 183-84 In her words, she is "responsible for everything that happens at Heritage." TR 24 She is on call 24 hours per day. DD 8, TR 185 Heritage's Chief Administrative Officer is Rick Hillbom. His responsibilities encompass overseeing all operations at Heritage. TR 26 He also is on call 24 hours per day. TR 185

⁵ The Managers, Assistants and Supervisors (discussed below) are conceded supervisors under §2(11) of the Act. DD 6 fn. 6, 7 fn. 7

The nursing staff reports directly to a named supervisor, i.e., the Manager, Assistant, or Supervisor. Regardless of how the Employer pictorially presents the supervisory hierarchy there is no document or any testimony that shows that the staff nurses are “supervised” by the charge nurses nor does the Regional Director find such. DD 7 Petitioner 2, entitled, Organizational Plan/Nursing, lists all the positions within the nursing department:

Positions within the Nursing Department are:

- 1 Direct of Patient Care Services/Nursing Site Leader
- 2 Clinical Manager
- 3 Clinical Supervisor
- 4 Assistant Clinical Manager
- 5 Clinical Nurse Specialist
- 6 Employee Health Nurse
- 7 Staff Nurse
- 8 Educational Resource Coordinator
- 9 Infection Control Nurse
- 10 Licensed Practical Nurse
- 11 Nurse Extern
- 12 Nurse Aide
- 13 Patient Attendant
- 14 Mental Health Worker
- 15 Staffing Coordinator
- 16 Department Secretary
- 17 Unit Secretary

Noticeably absent from the list is the position of charge nurse while every other named supervisor in the nursing units is present. P 2

2. Patient Care Guidelines and Documentation

Heritage is an accredited hospital. Accreditation is administered by the Joint Commission for the Accreditation of Health Care Organizations Standards (JCAHO). JCAHO addresses things such as the physical structure of a hospital, quality of care and

documentation. JCAHO requires hospitals to have policy and procedure manuals detailing the handling of patient care. TR 236

In compliance with JCAHO, Heritage has a document entitled, "Guidelines of Patient Care." P4 This document dictates that patient care is provided in compliance with established guidelines. Guidelines of Care define the level of care patients can expect. Structure Guidelines cover environmental conditions, staffing models, patient care supplies and things of the like. Guidelines of Practice make up the patient care guidelines. Policies and Procedures provide step by step instructions on how to perform various psychomotor tasks. Protocols define management of patient problems such as restraint, fall, or ambulation. Teaching plans define what, when and how patient education will be delivered. Patient management and clinical pathways define the care for a patient based on a medical diagnosis or problem. P 4

All administrative and clinical policies and procedures at Heritage are compiled in the policy and procedures manual. As the nursing site leader testified:

- A It's a policy and procedure manual that lists all different procedures that we do in the hospital, as well as administrative policies.
- Q When you say all different policies, what types of policies are involved?
- A Administrative ones that come from the nurse executive council that are such things as assignment of patients, taking of orders, staffing of orders that nurses are allowed to implement. And then there are specific policies that are for each unit based on specific types of patients or needs that they have.
- Q So there would be clinical policies then?
- A Both clinical and administrative.

TR 205-206

ARGUMENT

I. THE BOARD'S STATUTORY TASK AFTER *KENTUCKY RIVER*

Whether charge nurses are "employed as a supervisor," 29 U.S.C. § 152(3), and thus excluded from the NLRA's protection, turns on the answers to these questions: (1) whether the charge nurses "have authority . . . to . . . assign, . . . discipline other employees, or responsibly to direct them; or to adjust their grievances," and (2) whether "the exercise of such authority...requires the use of independent judgment." 29 U.S.C. § 152(11). Answering these questions requires the construction of these statutory phrases.

The Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S.Ct. 1861 (2001), addressed only the question of "whether judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience." 121 S.Ct. at 1864. And, the Court held that the Board may not employ a "categorical exclusion of professional judgments from a term, 'independent judgment,' that naturally includes them." *Id.* at 1870.

Given the narrowness of the issue addressed and decided in *Kentucky River*, it remains for the Board to determine what it means for a charge nurse or other highly trained or experienced employees to hav[e] authority to assign or adjust the grievance of other employees, or responsibly to direct them," and what it means for "the exercise of such authority...[to] require[] the use of independent judgment." 29 U.S.C. § 152(11).

The outcome of the nurse supervisor cases decided by the Board from *Providence Hospital*, 320 NLRB 717 (1996), *enfd*, 121 F.3d 548 (9th Cir. 1997), and *Ten Broeck Commons*, 320 NLRB 806 (1996), to *Kentucky River* was consistent with a

jurisprudence holding leadmen and other skilled employees in innumerable occupations with minor, operational authority over other employees to be employees protected by the Act. The Supreme Court's decision did not suggest that the inclusion of these employees was inconsistent with congressional intent. Rather, it suggested only that in the nurse cases the Board based their inclusion on an infirm statutory foundation. Petitioner urges in this case the consideration of whether there is a reasonable construction of the statutory terms "assign" and "responsibly to direct," terms that the Board recognized in *Providence* have never been fully defined, that is consistent with Congress' clear intent to include these skilled and experienced employees who have minor responsibilities at the bottom of the supervisory hierarchy within the Act's protections.

A. Authority to Assign Other Employees

In interpreting the statutory definition of supervisors, the Board has found the "[t]he term 'assignment' has not presented as much difficulty as the phrase 'responsibly to direct.'" *Providence*, 320 NLRB at 725. The term "assign," the Board suggested in its comprehensive summary of the law in *Providence*, "refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities." *Id.* It is the "prepar[ation] of monthly schedules [that is] the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment," the Board observed. *Id.* at 731. "Whether assignment also includes ordering an employee to perform a specific task is, however, less clear." *Id.* at 727. In *Providence*, the Board found it "unnecessary to reach the issue of the exact parameters of the term 'assignment' under Section 2(11)." *Id.*

The words, structure, and history of the statute all support a reading of the term "assign" as not encompassing simple day-to-day assignment of discrete tasks, but as pertaining instead to non-transitory work status changes of some degree of significance in the employee's work life (such as long-term shift change, or a long-term work location change). First, the syntax of the statutory language -- "authority...to...assign...other employees" -- strongly suggests that what is at issue is assignments *of* employees rather than assignment *to* employees. There is a palpable difference of grammatical usage between the two syntaxes, such that tasks or duties are usually assigned *to* a person, rather than the person to a task. Thus, for example, one would speak of assigning an electrician to the night shift rather than the day shift, but would speak of assigning the task of fixing a cable to electrician X. In the latter locution, it is not the electrician who is being assigned but the task.

Second, reading "assign" to refer to *non-transitory work status* changes is consistent with the rule of statutory interpretation that words in a list should be given similar meanings. The authorities listed in the "supervisor" definition -- "hire, transfer, suspend, lay off," etc. -- generally encompass matters pertaining to employment *status* rather than matters pertaining to performing day-to-day operations.

Finally, if interpreted more broadly, so as to include day-to-day assignment of discrete tasks, the term "assign" would be synonymous with the term "direct." Such an interpretation would not only render the term "direct" superfluous, but would subvert Congress' clear intent (discussed below) to limit the type of direction that makes an employee a supervisor by attaching the limiting word "responsibly" to the term "direct."

Consistent with this construction, the Board has held in numerous contexts that merely assigning tasks to employees does not make an employee a supervisor. *See, e.g., Plastic Industrial Products*, 139 NLRB 1066, 1067-78 (1962) (leadmen not supervisors when "they...assign operators to particular machines"); *Clark Machine Corp.*, 308 NLRB 555, 555-56 (1992) (assistant foremen in machine shop's assignment of jobs "is a function of routine work judgment and not a function of authority to use the type of independent judgment required of a supervisor"); *Kent Products*, 289 NLRB 824, 824 (1988) (welding department leadperson not supervisor when assessed jobs and available personnel and then assigned personnel to machines needed to perform jobs). *See also Providence*, 121 F.3d at 552 ("The charge nurses do not create the work schedule for other RNs. Rather, they make assignments of nurses to patients within the parameters of the supervisory nurse's monthly assignment schedule."); *J.L.M., Inc.*, 31 F.3d 79, 82 (2d Cir. 1994) (laundry "supervisor" who assigned duties to other employees in department not statutory supervisor); *Highland Superstores v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991) (warehouse leadman who told employees which trucks to unload and allocated time to perform tasks not supervisor); *NLRB v. McEver Engineering, Inc.*, 784 F.2d 634, 643 (5th Cir. 1986) (leadman on construction crew not supervisor). While some of these decisions appear to rest on a finding that the assignment of tasks did not require independent judgment, we submit that the firmer foundation for the holdings is that the assignment of tasks is not assignment as the term is used in §2(11).

In its Request for Review, the Employer argues that the charge nurses are supervisors because they allegedly assign and adjust grievances as defined in the Act. It

should be understood that the type of short term, discrete assignments that the Employer discusses is not the type of assignment, or direction, contemplated by Congress.

B. Authority to Responsibly Direct Other Employees

In *Providence*, the Board found it unnecessary to "develop a full analysis of the term 'responsibly to direct.'" 320 NLRB at 729. An express limiting construction of the phrase is now necessary because, as the Board has "long recognized," "there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees,' who nevertheless are not supervisors within the meaning of the Act because their authority is based on their working skills and experience." *Ten Broeck*, 320 NLRB at 809-810, quoting *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), *enf'd*, 257 F.2d 235 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959). In *Providence* and its progeny, the Board placed these employees outside the ambit of the Act's definition of supervisor by holding that the judgment they exercise in directing other employees was not independent judgment because it was based on their professional training or other skill or experience. The Supreme Court rejected this categorical limitation of the term "independent judgment" in *Kentucky River*. Without a limiting construction of the term "responsibly to direct," which has up to now been unnecessary, the Supreme Court's decision threatens to sweep leadmen, journeymen, and other skilled employees in diverse occupations across the economy - employees who Congress clearly intended to protect - outside the Act's scope.

In fact, the Supreme Court suggested just such a limiting construction in *Kentucky River* when it observed that "the Board could offer a limiting interpretation of the supervisory function of responsible direction" along the lines suggested but not developed in *Providence*. *Kentucky River*, 121 S.Ct. at 1871. The Court cited to a portion of the Board's decision suggesting that "supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position." *Providence*, 320 NLRB at 729. The Supreme Court stated, "Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires." 121 S.Ct. at 1871. It is this suggested construction, paralleling that of the term "assign" described above, that the Board should develop to carry out Congress' intent in this area.

Of the eleven types of supervisory authority listed in NLRA § 2(11), only the authority to direct other employees is qualified by the adverb "responsibly." This qualification in the statutory language indicates that the kind of direction Congress had in mind as an identifying characteristic of a supervisor was *not* the kind of direction to perform discrete tasks that a more experienced or more highly trained employee would give to a co-worker as a normal incident of the performance of the directing employee's own job.

Construing the phrase "responsibly to direct" as referring to a broader, managerial type of direction is strongly supported by the legislative history. The "responsibly to direct" language was adopted as an amendment offered from the floor by Senator

Flanders. Shortly before the Senate bill was passed Senator Flanders offered his amendment. The Senator explained his amendment's purpose as follows:

the definition of 'supervisor' in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department....

[A supervisor may be] charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance...

Such men are above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate Committee] report. Their essential managerial duties are best defined by the words 'direct responsibly,' which I am suggesting. [*Legislative History of the Labor Management Relations Act, 1947* at 1303 (GPO 1974) (hereinafter *Leg.Hist.*).]

In other words, Senator Flanders was concerned that the definition actually might not include foreman if all personnel functions other than the full-time direction of a group of employees in a department were centralized in a personnel department. His proposal was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objections certainly to including the words 'or responsibility [sic] to direct them.'" *Leg. Hist.* at 1304. The amendment passed by voice vote without further debate. *Id.* The amendment was thus intended to make clear that, consistent with the preexisting jurisprudence and the clear historical purpose of the supervisory exclusion, employees like foremen and department heads, who direct the work of an entire department, but have none of the other duties enumerated in the original Senate language, are still supervisors.

Senator Flanders' express intent is consistent with the overall intent of the Taft-Hartley Congress. It is clear from the historical context and the discussion in Congress that the unionization of foremen was the immediate problem Congress intended to address in the amendment and that Congress understood the term supervisor to mean foremen and those of higher rank. It is also clear that Congress understood the term foremen to encompass employees who performed no manual work but rather supervised a department or like unit.

The House Conference Report explained that the adopted conference language "confined the definition of 'supervisor' to individuals generally regarded as foremen and persons of like or higher rank." *Leg. Hist.* 539. In fact, the broader House bill has been attacked on the floor on the grounds that it "not only excludes foremen and higher supervisory employees [but others as well]." *Leg. Hist.* 652. In a similar statement to the Senate after the conference, Senator Taft explained, "The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. . . . The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." *Leg. Hist.* 1537.

Throughout the legislative history are statements that make it clear that it was "unions of foremen" that Congress intended to put outside the Act's protection. *Leg. Hist.* 299. See also *Leg. Hist.* 306-07, 410-11, 603, 1480, 1496, 1576. Senator Taft himself explained to the Senate that his "bill provides that foremen shall not be considered employees." *Leg. Hist.* 1008. See also *Leg. Hist.* 1519. Congressman Pepper stated the general understanding explicitly, "what [the bill] does, in substance, is to deny to supervisory personnel, whom we usually think of as foremen, the right of

collective bargaining.” *Leg. Hist.* 1167. In fact Congressmen often used the terms supervisors and foremen interchangeably. *See Leg. Hist.* 869, 993, 1606.

These clear statements that the exclusion of supervisors was intended to encompass only “foremen” and “persons of like or higher rank” are significant because the term “foremen” had a well-understood meaning in 1947. In fact, in the very case that Congress sought to overturn through adoption of § 2(11), *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board first observed that “the status and duties of all classes of foremen at Packard is the same as that of foremen in other mass production industry,” and then found: (1) The foremen “are in charge of one or more departments,” *id.* at 22, (2) “None of the . . . foremen perform[] any manual work,” *id.* at 23, and (3) “[E]ach foreman is responsible for the quality and quantity of production of the workers under his supervision,” *id.* Thus, members of Congress understood the exclusion of supervisors to apply to foremen or department heads who did not themselves work at the trade⁶ but rather supervised all employees in a department and to persons of “like or higher rank.”

The Board has consistently respected this congressional intent by “recognizing that ‘there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer’s plants and who incidentally direct the movements and operations of less skilled subordinate employees who nevertheless are not supervisors.’” *Ten Broeck*, 320 NLRB at 809-10, quoting *Southern Bleachery*, 115 NLRB at 791. The Board’s established jurisprudence holds that

⁶ In fact, the main “contrast” between foremen and the “straw bosses, leadmen, [and] set-up men” who Congress did not intend to define as supervisors was that the latter “spent most of their time in actual production.” N. Lichtenstein, “The Man in the Middle: A Social History of Automobile Industry Foremen,” in *N. Lichtenstein & S. Meyer, On the Line: Essays in the History of Auto Work*, 153, 157 (1989).

“assignment and direction . . . typical of leadman positions are not supervisory.” *S.E.I. Operating Partners*, 321 NLRB 111, 111 (1996). Providing “direction and guidance to other employees involved in a project based on . . . experience and craft skill” is not supervisory. *Id.* See also *Arlington Electric*, 332 NLRB No. 74 at 1-2 (2000).

The statement of Senator Flanders as well as the entire legislative history of § 2(11) suggests that the § 2(11) authority “responsibly to direct” is an “essential[ly] managerial” authority to direct the overall work of other employees, such as that traditionally exercised by a department head over all underlings in a department. By the same token, the type of task-direction typically performed by “leadmen” or “group leaders” is *not* the exercise of the authority “responsibly to direct.” *Neither* is the authority typically held by higher-skilled employees to direct their aides, helpers, support staff or apprentices to perform tasks.

The Board should place its jurisprudence in this area on a more secure foundation by considering the following four factors in determining whether an employee responsibly directs others: (1) the scope of the alleged supervisor’s authority to direct, i.e., whether he or she directs an entire department or just particular employees;⁷ (2) whether he or she directs others as to what duties to perform on an on-going basis or merely directs others to perform discrete tasks;⁸ (3) the extent to which he or she works at a trade and gives directions incidental to his or her performance of his or her own non-

⁷ The Board has cited this factor in its analysis of whether individuals have authority responsibly to direct employees. See, e.g., *Legion Utensils Co.*, 109 NLRB 1327, 1338 (1954) (“Panelli unquestionably is in charge of the polishing department with its 32 employees.”)

⁸ This is the distinction between directing “the manner of others’ performance of discrete tasks” and directing “other employees” suggested in *Kentucky River*, 121 S.Ct. at 1871.

supervisory functions;⁹ and (4) whether there is an identifiable supervisor (other than the alleged supervisor), who exercises § 2(11) supervisory authority over the employees the alleged supervisor purportedly directs.¹⁰

C. Use of Independent Judgment

While the *Kentucky River* decision rejected the Board's "categorical exclusion of professional judgment from the [the] term 'independent judgment,'" the Court expressly embraced the Board's understanding that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 121 S.Ct. at 1867. The Court also expressly held that the term "independent judgment" was ambiguous "with respect to the *degree* of discretion required for supervisory status" and, thus, "[I]t falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies." *Id.* In this regard, the *Kentucky River* Court cited as an example of the Board's proper exercise of its discretion, the Board's conclusion in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating

⁹ In prior decisions, the Board has repeatedly cited this factor. See, e.g., *Legion Utensils*, 109 NLRB at 1339 ("In view of the fact that Bilotti spends some two-thirds of his time polishing, the foregoing duties hardly constitute responsible direction of the work of employees."); *KGW-TV*, 329 NLRB 378, 383 (1999) ("such directions simply are incidental to the employees' ability to perform their own work"). In *New York University*, 221 NLRB 1148 (1975), the Board explained that it was attempting to distinguish between "professional employees who . . . are essentially supervisory" and "professionals with incidental . . . supervisory authority." *Id.* at 1156. Finally, the Board has repeatedly held that the directions issued by "skilled workers" to "helpers and apprentices" are not supervisory. See, e.g., *Koons Ford*, 282 NLRB 506, 513 (1986) *enfd.*, 833 F.2d 310 (4th Cir. 1987).

¹⁰ The Board and Courts have held that the continuous availability of an admitted supervisor militates against finding that lower-level employees are supervisors. See e.g., *Northcrest Nursing Home*, 313 NLRB 491, 500 (1993); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 133, 137 (7th Cir. 1989).

Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur.” 121 S.Ct. at 1867.

Accordingly, it remains necessary for the Board to consider whether employees’ discretion to assign and direct is circumscribed in such a manner -- by employer directions, outside regulations, routine procedures, etc. -- as to fall below the threshold of “independent judgment” set by § 2(11).

D. Use of Independent Judgment in the Exercise of Supervisory Authority

In applying the statutory definition of “supervisor,” it is important to keep in mind that some employees -- particularly highly trained or very experienced employees -- who have authority to direct other employees may exercise independent judgment in the performance of their own job *without* exercising independent judgment in “the exercise of such authority.” Often the exercise of “discretion or judgment” by such employees “in making and communicating necessary directions relates to their own responsibilities and is based on their experience and expertise.” *KGW-TV*, 329 NLRB at 382. “Making such decisions is the essence of their jobs,” and “[t]he communication of those decisions and coordination of their implementation with other . . . employees does not . . . entail the exercise of supervisory independent judgment.” *Id.* at 383. For example, it may take a great deal of independent judgment for a doctor or nurse to decide that a patient needs an x-ray. But, once that judgment has been exercised, directing an orderly to take the patient to the x-ray department is likely a purely routine act. Taking patients to x-ray is a normal and regular job duty for an orderly and the doctor or nurse does not exercise independent judgment in selecting an available orderly to perform this task.

The point in this regard is that the Board must consider not only the degree of discretion an employee has in making on-the-job decisions but whether that discretion is exercised in giving related directions to other employees. Only independent judgment that is exercised in carrying out one of the supervisory authorities is supervisory independent judgment.

II. APPLICATION OF THE STATUTORY CRITERIA TO THE FACTS OF THIS CASE

A. The Employer Bore the Burden of Proof

In *Kentucky River*, the Supreme Court affirmed the Board's placing of the burden of proof on the party seeking to exclude an employee from the Act's protection. 121 S.Ct. at 1866. This burden cannot be carried with conclusionary statements about an individual's authority. *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991). The Board has held parties strictly to their burden, making clear that "whenever the evidence is . . . inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). "[A]ny lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999).

It is important to remember that the Employer did not put one charge nurse on the stand. The Employer's testimony of the actual duties of the charge nurse and how they perform them came from management personnel. The primary witness for the Employer was the nursing site leader who admittedly spends maybe one half hour of her time on the floor.

The testimony of the two charge nurses called to testify, who collectively have at least 37 years of experience at Heritage in several different departments, varies greatly with the broad generalizations put forth by management witnesses. Management witnesses testified that charge nurses assign staff patients based on such factors as personality or knowledge that one nurse is better at some skill than another. However, they offered no specific instance of when, how, where or by whom those factors were used. Management testified that charge nurses have the ability to reassign staff or to be held accountable or to recommend discipline yet again offered no real life examples of this occurring.

In contrast, the charge nurses explained in detail the process they used in making assignments. Further, they provided real life examples of situations in which they might assign staff or ask staff to complete discrete tasks. As detailed below, none of these situations involved the use of independent judgment. Thus, as in *Sears, Roebuck*, 304 NLRB at 193, the Employer has relied solely on the “fragmented testimony” of management personnel claiming familiarity with the job duties of the [alleged supervisors.]” The testimony of all management witnesses was in the abstract and void of descriptions of specific incidents of the alleged supervisors exercising independent judgment. *Id.* at 197

B. The Duties of the Charge Nurse Are Not Supervisory Under Section 2(11) of the Act.

Charge nurses “frequently” take patients. DD 14 The record does not support the Employer’s contention that charge nurses take “substantially less” of a patient load than other RNs. Request for Review, pg. 15 Charge nurses do patient care on all shifts on six

of the nine units employing charge nurses (ICU, MSE, MSW, Rehab, ER and Behavioral Health) and on the afternoon and midnight shift in the IMC.¹¹ TR 102-109, 296, 388, 440, 465, 469, 585 There was no testimony regarding the charge nurse position at all in either the PACU or SS/OR units. The pain clinic does not have charge nurses. Therefore, charge nurses spend the bulk of their time doing patient care.

While there are job descriptions for every management and nursing staff position in the hospital there is not one for the position of charge nurse even though that alleged position has been in existence for many years. Employer 4 purports to be a hospital wide charge nurse policy. It wasn't until December 5, 2001, that the Employer began to write a charge nurse policy. TR 79 Interestingly, this flurry of activity began shortly after the UAW launched their authorization card collection drive which took place in November 2001. TR 582¹² The Petitioner contends ER 4 was initiated in response to its organizing drive. That aside, ER 4, the purported charge nurse policy, simply lists a set of non-supervisory tasks that any RN can perform and does perform on any given day.¹³ TR 417

ER 4: Draft Charge Nurse Policy

1. *Be responsible for staff assignments, bed assignments, and breaks/lunches for staff.*

As discussed below these tasks involve nothing more than routine application of the Employer's assignment policies and procedures.

¹¹ The record shows that charge nurses carry full patient loads on all shifts in the ICU and Rehab units and on the midnight shift in IMC, MSE, MSW units. TR 102-104 Charge nurses handle all admissions on the day and afternoon shifts in MSE and MSW and take patients as needed. TR 388 The record was conflicting as to whether charge nurses carry full or partial patient loads elsewhere.

¹² The union organizing drive began in June 2001. TR 582

¹³ ER 14 consists of the forms purportedly used in or before 1996 to assess charge nurse performance. These documents were not authenticated by any witnesses. Nor, are they documents referred to or used by any witness. The Employer's witnesses did not have knowledge as to how the rating scale was applied and could not testify to the intended purpose of the forms. ER 14 has no relevance to the issues in this hearing.

2. *Be responsible for narcotics sheet every shift.*

In practice, this is a non-supervisory task that is and can be completed by any RN on the shift. TR 576 It involves counting narcotics and signing the count form. TR 576 All drugs for the shift must be counted and the form signed prior to any staff leaving the unit. TR 576 While the Employer asserts that the “charge” is disciplined for non-completion of the task, the reality is a little different. Assistant Mikaelian testified that if he had a problem with the count he would go to the RN who had actually performed the count. TR 442

3. *Keep the unit in compliance to regulatory requirements.*

This was defined as keeping the linen cart covered or the medication cart locked. TR 92 This is a non-supervisory job that every nursing care provider performs.

4. *Have broad knowledge of the patients on their units.*

RN Welch testified that part of her duties would be to have a general idea of what is going on in the ER so that she can answer questions from unit managers regarding the number of possible admissions. TR 537-38 However, any nurse that answered the phone could answer those questions. TR 544

5. *Be present at shift report and rounds (if applicable).*

Often any RN available is present at shift report and rounds.

6. *Create and nurture relationships with other disciplines including physicians.*

All nursing staff are charged with the task of establishing and maintaining relationships with the people they work with. Their was ample testimony on the record that any RN can, and does, talk with doctors, call doctors if problems, call dietary, or talk with management on the phone. TR 515, 544, 576 The nursing site leader testified that the type of problems doctors might complain to the charge about is that the call light isn't being answered or something needs to be processed immediately. The completion of these types of discrete tasks, or even the assignment of them to another, does not require independent judgment in that the judgment used is that involved in regular or customary activities. *Training School at Vineland*, 332 NLRB No. 152, slip op. at 2 (2000). Other conclusionary examples offered such as a doctor requesting a change in RN assigned to their patient, were unsubstantiated on the record. TR 94-95

7. *Maintain their unit's Charge RN book by entering data for falls and restraints.*

This recordkeeping function can and is performed by any RN. TR 416

8. *Be assigned other tasks as appropriate by unit Clinical Nurse Managers.*

These non-supervisory tasks include: a) Audit patient charts by going through a checklist of items verifying that something is in the chart or not. The checklist is then turned over to the manager for action. TR 577; b) Run cardiac strips or lab reports by literally pushing a button on a machine. TR 571 These tasks are often performed by an RN or the desk secretary. TR 571-72, 600; or, c) Check the crash cart using a checklist to make sure all items on the list are on the cart. TR 572

Nowhere does the record reflect, as the Employer asserts, that the charge nurses possess broad supervisory responsibilities. The duties outlined above describe only routine, non-supervisory tasks. The Managers, Assistants and Supervisors are the conceded supervisors and possess broad supervisory responsibilities as described above. Further, the Employer's chain of command policies "specify that a nurse or charge nurse encountering any sort of patient, operational, or ethical problem is expected to notify a clinical manager or clinical nurse supervisor." DD 7 Therefore, the charge nurses possess no supervisory authority because they simply relay information to management.

C. Charge Nurses Do Not Have the Authority To Assign Under Section 2(11) of the Act.

The day-to-day assignment of discrete tasks engaged in by the charge nurses is not the type of assignment contemplated by Congress as discussed above. The Managers possess the assignment authority Congress had in mind in that they make the decisions that affect an employee's work life.

1. Managers possess the authority to assign under Section 2(11) of the Act.

Charge nurses do not schedule employees to their unit or shift nor do they call in staff to fill positions. The Regional Director found that, "[C]linical managers control work schedules, choice of shifts, and hours." DD 16 Management and/or doctors assign patients to floors and floor nurses or agency nurses to units. The Regional Director found that it was the responsibility of the managers to "ensure adequate staffing levels" and "the composition of staff to skill level when it comes to caring for patients in a particular

unit.” DD 20 Therefore, it is the managers, not the charge nurses, that assign within the meaning of Section 2(11).

2. The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when assigning staff to patients.

The Regional Director determined that the Employer has policies in place that govern the assignment of nursing personnel. DD 13 There are two policies that provide detailed guidance as to how to assign staff to patients, ER 6 Assignment (Patients) and ER 7 Assignment of Nursing Personnel. The objective of these policies is to “provide adequate numbers of licensed staff and other personnel to deliver care to patients.” ER 7, DD 13 The procedure outlined in ER 7 begins with the Clinical Manager assigning the unit personnel to “specific areas, teams or other responsibilities...” (III. A) Specifically, the policy provides that the staff meet and review the patients’ conditions (E 7 III. B. 1.), consider competency and classification of staff (the guidelines provide guidance and examples of how to do this), (E 7 III. B. 2.,)¹⁴ distribute the work evenly among the team members (and describes how to do that), (E 7 III. B. 3, C. 3.), assign based on continuity of care, (E 7 III. C. 4.), and other specific factors such as avoiding cross-contamination or in-service attendance. (E 7 III. C. 5. 6. 7.) ER 6 lists the equipment needed to complete assignments, acuity reports, competency logs (listing education of staff, TR 222), shift reports and assignment sheets.

In reality, as the Regional Director found, the “assignment of staff nurses to patients is much more perfunctory in practice than the Employer’s written assignment

¹⁴ The guideline provides that “patients with complicated treatments ... be assigned a RN, while “convalescing patients with minimal treatments or educational needs” be assigned an LPN. E 7,III. C.1.

policy indicates.” DD 14 RN Coffee’s concise testimony illustrated the theory in practice.¹⁵ Coffee testified that the designated charge obtains a list of scheduled staff for that day from the scheduling office. TR 565-566 All RNs listen to report from the off-going shift as a group. TR 565 Report, a summary from each shift nurse about the specifics of their patients, can be written, oral or taped. TR 249 After hearing report, the staff discusses each patient’s acuity rating. TR 448, 565

RNs make an acuity determination based upon their clinical experience and training. Often they make it via a group discussion. The record does not show how acuity is determined in all units. The Nursing Site Leader’s testimony regarding the acuity factor was generalized and non-specific. There was no discussion of any specific factors, if any, that go into deciding acuity. TR 95, 96, 103, 105, 106, 109 Of those units where testimony was provided, the Assistant in Behavioral Health testified that acuity was decided together as a staff (TR 448), and the Assistant from ER testified that acuity is decided by the RN who is assigned triage. (Whoever works triage is designated as the charge nurse.) TR 466 The Manager from MSW/MSE testified that acuity was decided by the charge nurse based upon a detailed chart provided by her. This unit has 3 acuity levels, level 1 is a patient not requiring a lot of care, level 2 is an average patient, and level 3 is a post-operative patient or a patient requiring a lot of nursing care. RN Coffee testified that in the IMC, a patient is designated as a “complete” if they require a lot of

¹⁵ RN Coffee’s testimony of how assignments are made in the IMC is generally how assignments are made in the other nursing units except for the Emergency room. As RN Welch and ACM Vogel both testified, assignments in the ER are made based on “geographical location.” TR 466 Further, to clarify, ACM Vogel testified that the afternoon charge may reassign personnel to perform *discrete* tasks as needed. TR 467

care, or a “non-complete” if they require lesser care. The decision in IMC as to acuity is made as a group. TR 565

From the testimony provided and following the assignment policy, it can be determined that acuity is often decided as a collaborative effort by the RNs that does not require the use of independent judgment as defined in the Act. In the MSW/MSE units, the Manager has provided the charge with a detailed policy that reduces any use of independent judgment below the supervisory threshold. *Dynamic Science, Inc* 334 NLRB No. 57 (2001) However, the Employer did not offer sufficient conclusive testimony to decide this issue. The testimony is contradictory and therefore inconclusive to show supervisory status has been established. *Phelps*, 295 NLRB at 490. Even after acuity is determined, and as dictated by the Employer’s own policy and found by the Regional Director, patients are still evenly divided among the staff. (See E 7) DD 20

With these facts in mind, the charge evenly divides the patients among the staff. In doing so, she provides continuity of care required by the Employer’s policies by assigning the same staff to the same patients each day they work. TR 566-67, P 5 DD 14 As pointed out by Assistant Carolyn Carney (behavioral health), the charge nurses’ primary goal is to “distribute the work load evenly” and have “staff feel their assignment is fair.” TR 302 Rehab Assistant Nick Mikaelian, said assignment of patients is done by assigning staff to the same block or same area. TR 445 Manager Sue Caines testified that charge nurses would assign the same nurses to the same patients “as often as possible.” TR 415

The Board has repeatedly held that assignments that are made to equalize employees’ workload are routine. *KGW-TV*, 329 NLRB at 382; *Byers Engineering*

Corp., 324 NLRB at 741; *Parkview Manor*, 321 NLRB 477, 478 (1996); *Providence*, 320 NLRB at 727 (“Balancing work assignments among staff members . . . does not require the exercise of supervisory independent judgment.”); *Ohio Masonic Home*, 295 NLRB 390, 395 (1989) (equal division with equitable distribution of “difficult” residents routine). *See also NLRB v. Harmon Indus.*, 565 F.2d 1047, 1049-50 (8th Cir. 1977) (employee “in charge” of repair department not supervisor when assigns work to employees based on “who was busy and who wasn’t”).

The Employer argues that the skill or experience of a nurse is matched to the patient by the charge nurse. As the Regional Director found, the charge nurses (and management) follow the detailed policies provided by the hospital when performing assignments. DD 20 The assignment policy states to consider competency (defined as education by the Nursing Site Coordinator) and classification. The Employer did not provide specific testimony as to when, how often or where this type of matching occurs. Therefore, as discussed below, the Employer did not meet its burden in showing that the charge nurses meet the statutory definition of supervisor when assigning patients. However, the examples of the type of matching that was offered by the Employer makes the selection of the appropriate personnel obvious. The Employer offered general testimony that charge nurses matched patients to staff where patients have a specific medical problem requiring a particular skill. The Employer witnesses stated that patients needing a nitrol drip, a nurse trained in orthopedics or pediatrics, a nurse that can read a monitor, or a nurse that perform IVs will be given to an RN that possesses the particular skill required. TR 109, 269, 308, 381 In reality, only certain RNs are able to perform the required tasks. The selection of an RN, not a particular RN, that possesses the medical

skill needed is obvious. Further, if a patient only speaks a particular language and there is an RN that also speaks that language available, the assignment is again an obvious choice. TR 307 Finally, the Employer argues that assignments may be completed based on matching of sex or ethnicity. TR 302, 307 If a situation occurs that requires a match in these instances, and there were no specific instances offered on the record, the discretion and judgment used is minimal and not indicative of supervisory authority as described above.

Further, the record provides contradictory evidence because the charge nurses testified that a nurse's skill only played a part in the assignment if the nurse did not have the requisite skill necessary to perform a needed task. DD 13, TR 560, 602, 447 There was no evidence that RNs' skills vary significantly. RNs that regularly work in the unit requiring such have the requisite training and experience to read monitors. There is no finer differentiation among them. TR 593, 600 In fact, RN Coffee testified that there is no difference in skill level of the regular staff in the unit. Other than determining whether a particular nurse possesses an RN license or is certified to read monitors or perform CPR, simple yes/no type determinations, the charge nurses make no judgments regarding skills when assigning patients to staff.

"The general testimony that leaders match patient needs to RN skills is unpersuasive." *Providence Hospital*, 320 NLRB at 733. However, if the capacities of the RNs are well-known, requesting an RN with a known capacity to perform a task to perform the task does not require independent judgment. The Board has so held in numerous contexts. See, e.g., *Hausner Hard-Chrome of Ky.*, 326 NLRB 426, 427 (1998); *S.D.I.*, 321 NLRB at 111; *Providence*, 320 NLRB at 731; *Clark Machine*, 308

NLRB at 555-56; *Injected Rubber Products Corp.*, 258 NLRB 687, 689 (1981); *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949).

The Regional Director found that the charge nurses assign other staff to patients. DD 13 More specifically, the record shows that on some units patients are evenly divided among the aides. In others, aides are assigned to a block of patients. TR 113 In still others, aides make their own assignment. TR 568

The assignment process described above does not fall within the statutory term “assign” as explained above in Section II. A. ?? Further, even if this type of assignment did fall within the definition, as the Regional Director found, the charge nurses do not exercise independent judgment when assigning staff to patients. The Regional Director held that “the weight of the evidence suggests that in practice, the assignments are routine in nature, and are based mainly on principles of fairness and the even distribution of work.” (citing *Byers Engineering Corp.* 324 NLRB 740; *Providence Hospital, supra*; *Ohio Masonic Home, supra*) DD 20 Further, he held, as the Board did in *Dynamic Science, Inc.*, 334 NLRB No. 56 and in *Chevron Shipping Co.*, 317 NLRB at 381, that the assignment of employees “falls below the supervisory threshold” when it is circumscribed by “a superior’s standing orders and the employer’s operating regulations.”

3. The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when assigning breaks and lunches.

The record shows conflicting testimony as to the charge nurses’ actions when assigning breaks and lunches. The Charge nurses testified, and the Regional Director found, that charge nurses assign break and lunch times by asking staff their preferences

and dividing the group evenly to ensure coverage on the floor. DD 20, TR 136, 568 In some units, the staff schedules their own lunch times. TR 533 Conflicting evidence is inconclusive and the Board must find that supervisory status has not been established.”

Phelps Community Medical Center, 295 NLRB 486.

If times need to be changed, charge nurses cannot mandate employees to switch. Contrary to the Employer’s assertion that charge nurses maintain the responsibility to juggle break and lunch times, the evidence shows no such authority. The charge nurses testified that if they had to ask someone to take another time and the person refused, they would contact management. TR 578 However, no actual evidence of this is found in the record. Therefore, the Employer failed to meet its burden. A lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB at 536, fn. 8.

4. The Employer did not meet its burden in showing that charge nurses exercise supervisory authority when reassigning staff.

Reassignment of personnel by the charge nurse occurs when "there is a change in a patient's condition such that different care is warranted." DD 13 Admissions are assigned by looking at who is next in line for a new patient and looking at current patient load. DD 15 At times the desk secretary receiving the call regarding a new admission gives the call to any RN at the nurse station or even assigns a bed herself. TR 492 Assignment changes can occur if "a patient requires more work than expected, or if a patient's condition changes which requires more treatment..." DD 14 In situations where a patient suddenly requires more attention, the RNs, "as a common courtesy of their profession" work together. DD 14 Coffee testified that changes in assignment made

during a shift are made just as initial assignments are made. TR 602 However, if "everyone had a full load, [the charge nurse] would go to the manager" for resolution. DD 15 If the census increases, it is the manager who must adjust staffing levels. E7 II. E. , I. The charge nurse does not have the authority to force another nurse to take another patient. DD 15 However, the record is void of any specific instances regarding reassignment. In sum, it is the Manager's job to ensure adequate staffing levels and to resolve any staffing complaints. The charge nurse follows the assignment policy and their function is routine in nature and not within the realm of supervisors as described above.

5. The other duties engaged in by charge nurses are not indicative of supervisory status under Section 2(11) of the Act.

As outlined in the discussion of ER 5, the other duties of the charge nurse are to count narcotics, check the crash cart, run labs, pull cardiac strips or perform chart audits. TR 576, 577 These tasks can be, and often are, performed by the staff nurses. TR 571, 600 In fact, a desk secretary can perform these tasks. TR 572 These tasks merely involve simple counting or the use of a checklist indicating if an item is on the cart or included in a chart, or not. The Employer did not offer any evidence that asking another RN to complete one of these yes/no type tasks involved any discretionary judgment.

Further, the Board has also specifically cited the use of checklists of tasks as a form of employer instruction that reduces discretion below the statutory threshold. *Acme Markets, Inc.*, 328 NLRB 1208 (1999) (no exercise of independent judgment when allegedly supervised employees - staff pharmacists and pharmacy technicians - followed "standardized detailed task lists"). See also *Ten Broeck*, 320 NLRB at 807, 811. The Supreme Court endorsed this line of cases in *Kentucky River*, 121 S.Ct. at 1867.

Therefore, the performance of these low level discretionary tasks does not fall within the parameters of supervisory authority.

Other non-supervisory duties of a charge nurse, or any RN, are to discuss patient care with a physician or talk to a family member. DD 13, TR 75, 94 RNs Coffee and Welch testified to specific types of situations where this may occur. Coffee stated she has been asked to get a new patient a food tray or help lift someone that fell. TR 589 Welch testified she receives two complaints, the wait is too long or a patient's belongings are lost. Other than calling the lab to see why a test result is held up or verifying the wait time, there is nothing else a charge nurse can do. What they do, any RN can and should do under their job description. The Regional Director found that RNs do not "interact any differently with other RNs on staff" when acting as charge or not. DD 14 If other action is necessary, the charge nurses relay the problem to management as dictated by policy. TR 542-44

While a charge nurse's role on the unit is to generally be available to field questions and to assist in patient care, the charge nurse's role is reportorial at best. Item H of ER 5(d) reads, "Charge Nurse will inform Nurse Manager/Assistant Nurse Manager or designee of any acute changes in the patient's condition, admissions or discharges from the unit." Hospital policy dictates that if anything unusual occurs a charge nurse, or any RN, must contact their supervisor. Charge nurses, as illustrated elsewhere, may field simple questions and problems but, as found by the Regional Director, they possess no real authority. Any problems that cannot be resolved informally are "relayed to supervision." DD 19

The Employer argues that charge nurses are accountable for the performance of the staff. The Regional Director made no such finding. The Regional Director did find that it is not the charge nurse's job to evaluate the work of other staff or make sure work has been completed or done correctly. DD 20 While it is true that RNs are evaluated on leadership and professional development, the Employer did not provide conclusive evidence that this category measured an RN's skills in those areas solely with respect to the charge nurse position.¹⁶ There is no specific evidence of any procedures where charge nurses evaluate or are held accountable for others' work. Moreover, management is accountable for the operation of the unit and each staff member is accountable for their own performance as to patient care. As the Regional Director found it is management that handles performance evaluations, staffing issues and patient complaints. DD 15

Management, as discussed below, handles all discipline. If a nursing staff member's performance requires corrective action, the collective bargaining agreement and the handbook make clear that is the job of management. The Employer's witnesses provided only conclusionary statements regarding a charge nurse's accountability; therefore, the Employer failed to meet their burden of proof. *Sears, Roebuck*, 304 NLRB at 193.

The Employer argues that charge nurses can be disciplined for performance of, or non-performance of, charge nurses duties. In support of this argument, the Employer offered second hand testimony of two single, isolated occurrences in which an RN, when acting as charge, was disciplined. The disciplines were not offered into the record. The

¹⁶ As the record shows the terms "leadership" and "professional development" encompass such things as taking classes, going to conferences, or taking initiative on the job. This category is completed for every RN, not just those taking charge. TR 197-98

persons involved in the alleged incidents did not testify. Even if these disciplines occurred, they are not indicative of supervisory status. Discipline for failure to perform a job task is not one of the indicia for supervisory authority. Actually performing the discipline is the significant factor. Here, it is established that charge nurses do not discipline.

D. Charge nurses do not have the authority to adjust grievances.

The Regional Director correctly found that “[T]here is no evidence that the charge nurses are empowered to adjust any formal employee grievances” (DD 19) and it is management’s job to handle conflicts in the unit, staffing issues, and patient complaints. DD 15 The SEIU Local 79 contract includes a grievance procedure and a disciplinary procedure with a new “verbal counseling” pre-step. TR 490 Undisputed testimony was offered by the chief steward that charge nurses play no role in any part of the grievance or disciplinary process. TR 490, DD 19 Further, the non-union employees have a dispute resolution and progressive disciplinary process outlined in the Employer’s handbook. All aspects of these policies are handled by Heritage management. DD 5, 6, 16

The Employer offered general nonspecific testimony that charge nurses initiate or handle complaints about the performance of other staff, however, the Regional Director found no evidence that charge nurses have any authority to discipline or effectively recommend discipline. DD 19 The charge nurses testified they never have received or written a complaint about the performance of another co-worker in either their role as charge or RN, nor, do they possess the authority to do anything about any complaints other than refer them to management. TR 505, 508, 577 In fact, many witnesses testified

that any employee may initiate a complaint regarding another co-worker's performance and discuss it with the Manager. TR 210, 564 RN Welch testified that as an RN, if she had a problem with a co-worker she would take it to her Manager, not the charge nurse for the day. TR 508 This would be the appropriate way to handle it as hospital policies require that any problems be referred to management.

On occasion, a staff member may not be able to go on lunch or break at a time originally slotted and need to make a change. Either they themselves or a charge nurse can ask another employee to switch times. A charge nurse cannot mandate that employees switch times because they possess no authority to do so. If a co-worker refused, the problem would be taken to management for resolution. TR 578 The Regional Director determined, based on the presented evidence, that, "complaints or disputes brought by the nursing staff to the charge nurse that cannot be resolved quickly in an informal manner are relayed to supervision." DD 19 As found by the Board in *Ken-Crest Services*, 335 NLRB No. 63 (2001), the charge nurse's role in grievance resolution is little more than relaying information to management. Finally, just by the nature of the rotating charge position, one day an RN is charge, the next day not, the RNs work together to solve any problems that occur. DD 20

The Employer contends that the charge nurses are the "first line" of supervision. The charge nurses testified that the only involvement they might have in resolving a problem was to talk to the people involved. TR 542, 578 On cross, RN Coffee was asked what she might do, hypothetically speaking, if there was a personality conflict between a nurse and a patient. RN Coffee stated she would ask another nurse to trade

patients. TR 577 As the Regional Director found, this type of low level involvement does not “empower” the charge nurse to resolve grievances.

In *Ken-Crest*, a program manager handled a personality conflict between residential advisors by talking about the issue. He made several suggestions to the involved people to help resolve the issue and upon failing relayed the problem to management. The Board found this type of interaction by the program manager did not confer supervisory status upon the program manager stating that “limited authority to resolve minor disputes is insufficient to establish supervisor status.” *Id.* at slip op. 3. Further, the authority to resolve squabbles between employees does not “warrant an inference sufficient to establish supervisory status.” *Id.*

The chain of command outlined in ER 8 is consistent with the testimony of the charge nurses regarding their role when problems arise on the unit. Section III, items 1 and 2 of ER 8 reads,

1. Nursing staff member communicates verbally and/or in writing of a concern/issue to the charge and/or Clinical Manager/Clinical Supervisor.
2. If unable to resolve, the *nurse manager/supervisor* will contact the Nursing Site Leader.” (emphasis added)

The charge nurses testified that if a problem could not be simply resolved it would be taken to management for action and if they received a complaint from a nursing staff member they would relay that concern to management. This is exactly what ER 8 states; when a charge nurse is made aware of a problem, it is communicated to management for action. Charge nurses have no authority to resolve complaints. TR 578

At most, the charge nurses here might resolve minor squabbles by helping the individuals talk it out. This action does not confer supervisory status. *Ohio Masonic*

Home, Inc. 295 NLRB at 394. (“[T]he fact that the charge nurses sometimes rely on their personal relationship with employees to resolve minor complaints regarding workload, the scheduling of lunches and breaks, or personality conflicts is insufficient to establish supervisory status.”) Therefore, the Employer did not meet its burden to prove the charge nurses possess the authority to adjust grievances.

E. Secondary Indicia Does Not Establish Supervisory Status.

The Regional Director did not find the Employer’s argument regarding ratios of supervisors to staff compelling. ER 9 purports to show the ratio of supervisors to staff for a two week period. This is not a normal week in that it involves a holiday week-end. Further, the exhibit does not include the on call supervisors nor the non-nursing personnel supervisors in the building. Secondary indicia of supervisory status, no matter how prevalent, is not sufficient to establish supervisory status. *S.D.I.* , 321 NLRB at 112; *J.C. Brock Corp.*, 314 NLRB 157, 160 (1994)

However, if the Board were to find that the charge nurses are supervisors, then on any given shift, in any given department, the ratio of supervisors to staff would be greatly skewed in the other direction. For example, in mental health on the day shift, the unit would have 8 to 10 supervisors (clinical manager, assistant clinical manager and RNs) and 9 to 10 staff (LPNs, mental health workers and desk secretary). TR 291 That would be an equal number of supervisors to workers. In the IMC, the ratio of supervisors to workers on the day shift would be about 5 to 4 (4 RNs plus the clinical manager to 1 LPN plus 2 aides plus one secretary). TR 560 That would be a ratio of more supervisors to workers on one shift. Certainly, not an outcome the Board Intended.

Our long familiarity with the realities of working conditions has taught us that since supervisors are entrusted to assure the workability of company operations, an overabundance of supervisors would be counterproductive. Were we to credit the Employer's contentions regarding the supervisory status of the employees in issue, the ratio of supervisors to work force would be approximately two to one.

General Dynamics Corp., 213 NLRB 851, 859, fn. 26 (1974).

F. The RNs when functioning as charge nurses are not exercising supervisory authority.

The test for deeming an employee a supervisor when they occasionally take over the supervisor's duties is whether the exercise of supervisory authority is both regular and substantial. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) The Regional Director found that the very nature of the rotational process dictates against a finding that the charge nurses are supervisors. "A charge nurse assigning a patient to a staff nurse one day, can the next day be assigned a patient from the same staff, when the roles are reversed." DD 20 As discussed above, a significant portion of patient care is performed by RNs. There are relatively few LPNs and other than the mental health unit, each unit only has one or two aides per shift. Therefore, what occurs is a group of professionals taking turns being in charge of each other. This type of set-up is not indicative of regular and substantial exercise of supervisory status. *General Dynamics Corp.*, 213 NLRB at 859. Due to the rotating nature of the charge nurse position, the RNs, when functioning as charge nurses, are not exercising supervisory authority.

If the Board finds that some of the charge nurses possess supervisory authority under Section 2(11), the remaining question is which nurses "regularly and substantially" perform these tasks such that they should be excluded from the unit. The Petitioner

contends that this issue should be remanded back to the Regional Director for determination because the record is inconclusive.

Employer Exhibit 17 (ER 17) shows regular hours worked, overtime hours worked and charge hours worked for the year 2001. It purports to be an inclusive list of all nurses that performed the charge nurse duties in 2001. However, it is not a list of all RNs eligible to be in the proposed unit. For instance, ER 17 does not include at least 49 names of Heritage employees, some found on a prior employer exhibit, ER 12, and some not. ER 17 does not include those RNs classified as either in-house flex or contingent. Therefore, neither ER 12 nor ER 17 is inclusive of all nurses working at Heritage.

Some of the employees missing from ER 17 have since been reflected as new employees by the Employer. However, some of these missing individuals were reflected on ER 12 as nurses within the unit that perform charge duties. For instance, looking at the PACU/OPS unit, T. Currie's absence from ER 17 is explained because she is a new employee, yet, ER 12 shows her as a nurse that is assigned charge duties. Further, in the PACU/OPS unit, J. Kenninburg, M. Simmons, and K. Terry are listed on ER 12 as taking charge duties but are not included in ER 17. A. Boulis and V. Jean are not included on either ER 12 or ER 17, yet, the Union has reason to believe they are RNs employed by Heritage. All of this information points toward the conclusion that neither ER 12 or ER 17 are accurate reflections of the entire group of RNs employed at Heritage. Further, ER 12 is not an accurate reflection of those nurses that actually were assigned charge nurse duties in 2001.

The Regional Director notes that ER 17 was received into the record, not as a complete list of all employees, but to show on average the frequency that staff nurses

may work as charge nurses. There is not enough evidence on the record to determine which nurses work as charge nurses regularly and substantially. Due to the nature of the assignment process, nurses may choose not to work charge at all or they may choose not to volunteer for the position at any given time thereby challenging their "regularity" in the position. Some nurses rotate through the charge position very infrequently as a fill in on vacation and weekends for the permanent charge. Identification of these nurses is unclear from the record. Therefore, if charge nurses are found to possess supervisory authority, the question of eligibility should be remanded to the Regional Director for a finding of conclusive evidence.

CONCLUSION

For the reasons stated above, the Board should uphold the Regional Director's decision finding the charge nurses are not supervisors.

Respectfully Submitted,

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Dated: April 10, 2002

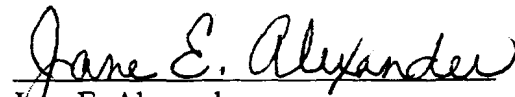
CERTIFICATE OF SERVICE

The undersigned hereby certifies and declares that copies of the document(s) referenced below were served as follows:

1. Document(s) served: Petitioner's Brief in Support of Regional Director's
Decision and Direction of Election

Certificate of Service
2. Served upon: Service list below
3. Method of service: U.S. Postal Service Priority Mail
4. Date served: April 10, 2002

I certify and declare under penalty of perjury that the foregoing is true and correct.


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